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# COLUMBIA LAW REVIEW.

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Vol. XVI.

MARCH, 1916.

No. 3

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## THE FEDERAL TRADE COMMISSION.

The Federal Trade Commission is the second in the class of commissions with broad and unusual powers, created to administer the laws of Congress. The Interstate Commerce Commission was the first in this class. These Commissions administer laws regulating commerce, and the basic authority for creating them and conferring upon them the powers enumerated in the several acts which they administer, is the commerce clause of the Constitution of the United States.

Leaving out of consideration commerce with the Indian tribes, the commerce clause, as judicially construed, relates to the *movement of passengers and property* in interstate and foreign commerce, and that intercourse or conduct of business affairs, which results, or is intended to result, in such movements. This covers the transportation, including the receipt and delivery, of traffic; the solicitation of trade in things that are to be transported; the freedom to move, and the protection during the movement of the commodities transported and of the agencies and instrumentalities engaged in such movements. It also covers contracts for transportation, bills of lading which represent the things transported, and marine insurance without which traffic would not move over-sea. It includes the drummer employed to sell a commodity in a State other than the one in which it is produced, but it does not include the person or employee who produces the commodity. It does not include life and fire insurance, or the loaning of money, or the making of contracts of sale of real estate or other property which can not result in transportation. The regulation of the *transit* of persons, property and messages, interstate and international, is the *primary* and the *ultimate* object of the commerce clause. This draws after it every business activity which makes *directly* for

that end, or which is an aid to commerce. Any legislation by Congress, therefore, creating an administrative commission and giving it jurisdiction over commerce must have for its object the freedom, protection and regulation of the channels and subjects of interstate and foreign commerce and of those agencies which immediately concern it. Agriculture, manufacture, milling and refining, produce things that may become subjects of this commerce, but these occupations within the States, are not subject to direct regulation by Congress. The regulation of these local affairs is under the police and regulatory powers of the States.

There are three constituents in commerce: the agents engaged in transportation, the instrumentalities employed, and the subjects carried. Having jurisdiction of any one of these constituent parts, Congress may regulate the whole. This is illustrated in the amendment to the Safety Appliance Act, March 2, 1903, 32 Stat. 943, c. 976, wherein Congress declared that its provisions and requirements should "apply to *all* trains, locomotives, tenders, cars, and similar vehicles used *on any railroad engaged* in interstate commerce." The Supreme Court held that this amendment enlarged the original Act and made it embrace cars used in intrastate traffic *upon a railroad* engaged in interstate traffic; thus bringing under Federal control the instrumentalities used in commerce wholly within a State.<sup>1</sup> It was also held that a water carrier having arrangements with railroads for a continuous carriage or shipment of interstate traffic—although it amounted to only about 2 per cent of the traffic carried by the water carrier—brought the water carrier under the provisions of the Federal regulation systematizing the accounts kept by carriers subject to the Act. That having jurisdiction of the agent, the Federal Commission could require all receipts and disbursements of revenue by the carrier, including that received from intrastate and port-to-port business, to be kept in accordance with the Federal regulations.<sup>2</sup>

Some subjects or commodities are excluded from the channel of interstate commerce by Federal law.<sup>3</sup> Admittedly it was beyond the power of Congress to prohibit lotteries within a State, but it could forbid the tickets from becoming subjects of interstate commerce.

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<sup>1</sup>*Southern Ry. v. United States* (1911) 222 U. S. 20, 30 Sup. Ct. 2.

<sup>2</sup>*Int. Com. Comm. v. Goodrich Transit Co.* (1912) 224 U. S. 194, 32 Sup. Ct. 436.

<sup>3</sup>*Lottery Case* (1903) 188 U. S. 321, 23 Sup. Ct. 321.

These illustrative cases show that Congress may legislate either in reference to interstate and foreign commerce generally, or in reference to any of the constituent parts of such commerce, and through a regulation of a constituent part of commerce, materially affect subjects which otherwise are exclusively under state control.

The Interstate Commerce Commission is given jurisdiction over transportation by carriers named in the Act to regulate commerce. The question, therefore, arises: what part of this defined field, covered by the Commerce Clause of the Constitution, is to be covered by the Federal Trade Commission? There can be no doubt that it is some distinct part of the field of regulation not already covered and administered by the Interstate Commerce Commission, for the new Act expressly excepts from the jurisdiction of the Trade Commission "common carriers subject to the Acts to regulate commerce." (Sec. 5.)

The Act to create a Federal Trade Commission<sup>4</sup> contains but one substantive law affecting the conduct of persons, and corporations. This rule of conduct is set forth in section 5, and declares:

"That unfair methods of competition in commerce are hereby declared unlawful."

In section 4 it is provided that:

"'Commerce' means commerce among the several States or with foreign nations. . . ."

Putting to one side the duties devolved upon this Commission of aiding in the enforcement of the Anti-Trust Acts and its general visitorial powers, let us examine this substantive law which the Commission is empowered to enforce by its orders. Section 5 provides:<sup>5</sup>

"The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, *from using unfair methods of competition in commerce.*"

The commerce above defined, is interstate and foreign commerce. What, then, are "unfair methods of competition" in interstate and foreign commerce? We may divide this question into two: (1) What are unfair methods of competition, and (2) What

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<sup>4</sup>38 Stat. 717.

<sup>5</sup>38 Stat. 719. Italics added by the author of this article.

relation must the unlawful methods or the business in which they are prevalent, sustain to interstate or foreign commerce?

1. This Act does not declare all methods of competition unlawful. The Clayton Act and this one were considered together and while separate in fact and form, for the purposes of construction they may be considered as a single legislative act. From these acts, and the debates in Congress leading up to their adoption, it is very clear that competition is considered desirable and is to be fostered and maintained. Free competition is regarded by many as the only remedy for some industrial and commercial evils. This economic law has been recognized by publicists and jurists in all generations as of supreme importance to public welfare. Upon the free and normal operation of competition depends, it is said, the quality, quantity and reasonableness of price of products consumed by the public. It stimulates and at the same time regulates production; it improves the methods of production and thereby lowers prices and extends trade; it stimulates scientific investigation and experimentation which result in new processes and new products, useful and helpful to mankind. Undue restrictions upon trade hinder these results.

Laws against monopoly have sometimes proved to be detrimental to trade. The common law prohibitions upon engrossing and forestalling were later repealed. The Chief Justice, commenting upon this in the *Standard Oil Case*,<sup>6</sup> said:

"From the development of more accurate economic conceptions and the changes in conditions of society it came to be recognized that the acts prohibited by the engrossing, forestalling, etc., statutes did not have the harmful tendency which they were presumed to have when the legislation concerning them was enacted, and therefore did not justify the presumption which had previously been deduced from them, but, on the contrary, such acts tended to fructify and develop trade. . . . After all, this was but an instinctive recognition of the truisms that the course of trade could not be made free by obstructing it, and that an individual's right to trade could not be protected by destroying such right."

The freedom of trade has, in later years, been the aim of the law. President Wilson, in his message to Congress, recommending this trade legislation, said:

"What we are purposing to do, therefore, is, happily, not to hamper or interfere with business as enlightened business men

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<sup>6</sup>*Standard Oil Co. v. United States* (1911) 221 U. S. 1, 55, 56, 31 Sup. Ct. 502, 513.

prefer to do it, or in any sense to put it under the ban. The antagonism between business and government is over."

He then proceeds to condemn severely those practices which stifle competition. In the report of the House Committee it is stated:

"The administration idea, and the idea of business men generally, is for the preservation of *proper competitive conditions in our great interstate commerce.*"

In the report of the bill by the Senate Committee it is stated:

"Some would found such a commission upon the theory that monopolistic industry is the ultimate result of economic evolution and that it should be so recognized and declared to be vested with a public interest and as such regulated by a commission. This contemplates even the regulation of prices. Others hold that private monopoly is intolerable, unscientific, and abnormal, but recognize that a commission is a necessary adjunct to the *preservation of competition* and to the practical enforcement of the law. The functions of such commissions would be as distinct and different as the ideas upon which they are founded. The commission which is proposed by your committee in the bill submitted is founded upon the latter purpose and idea."

The continued prevalence of the law of competition may therefore be regarded as an approved and dominating policy of the Federal Government.

It is "*unfair methods of competition in commerce*" that the Act condemns. The statute gives no definition of this phrase; no standard is set up in the Act by which to measure or determine whether a particular method falls within the prohibition of the Act. The phrase "*unfair methods*" falls within the class of elastic terms contained in the Act to regulate commerce, "*unreasonable rates*" and "*unjust discrimination*" and "*undue or unreasonable prejudice or disadvantage*" which are, by that Act, declared to be unlawful. The determination of whether the Act to regulate commerce has been violated, in either of these particulars, by a carrier, is determined as a *question of fact* by the Interstate Commerce Commission. The Commission decides what is *unreasonable, unjust or undue*. So, under the Act creating the Trade Commission, this question of what are "*unfair methods of competition*" must be determined by the Commission as a *question of fact*.

At common law "*unfair competition*" consisted in representations, expressed or implied, that the products or business of one

man were the products or business of another whose reputation was established. It consisted largely in the infringement of trade marks, or the use of marks, words or symbols not necessarily subject to exclusive use by anyone, where the circumstances of appropriation and use by a person tended directly to deceive the public and to secure a trade already established by another, by means of such deception. In *Rathbone, Sard & Co. v. Champion Steel Range Co.*<sup>7</sup> the court said:

"The rule is well settled that nothing less than conduct tending to pass off one man's merchandise or business as that of another will constitute unfair competition."

In *Goodyear Company v. Goodyear Rubber Company*<sup>8</sup> Mr. Justice Field, speaking for the court, said:

"The case at bar cannot be sustained as one to restrain unfair trade. Relief in such cases is granted only where the defendant, by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff, thus palming off his goods for those of a different manufacture, to the injury of the plaintiff."

In *Coats v. Merrick Thread Company*<sup>9</sup> the charge was that "the defendants have been guilty of an unlawful and unfair competition in business, in that they have been infringing the rights of plaintiffs in and to certain marks, symbols and labels . . ." In this case it was held that irrespective of any question of trade-marks, manufacturers have no right, by imitative devices, to beguile the public into buying their wares under the impression that they are buying those of their rivals.

In *Fischer et al. v. Blank*<sup>10</sup> the Court of Appeals of New York held that where tea was put up in packages or wrappers in colors, having certain devices, intended to deceive the public as to the origin of the tea; that the use of such packages, although not a trade-mark, is *unfair competition*.

Since the passage of the Anti-Trust Acts by Congress and the development of new competitive methods in the industrial and commercial life of the nation the term *unfair competition* has been extended to some modern practices.

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<sup>7</sup>(C. C. A. 6th, 1911) 189 Fed. 26, 30.

<sup>8</sup>(1888) 128 U. S. 598, 604, 9 Sup. Ct. 166, 168.

<sup>9</sup>(1893) 149 U. S. 562, 13 Sup. Ct. 966.

<sup>10</sup>(1893) 138 N. Y. 244, 33 N. E. 1040.

Mr. Wm. S. Stevens of Columbia University, in an article on this subject, includes within the term "unfair competition" the following: local price cutting; operation of bogus independent concern; maintenance of "fighting ships" and "fighting brands;" lease, sale, purchase or use of certain articles as a condition precedent of the lease, purchase or use of other required articles; exclusive sale or purchase arrangement; rebates and preferential contracts; acquisition of exclusive or dominant control of machinery or goods used in the manufacturing process; manipulation; black lists, boycotts, white lists; espionage and use of detectives; and coercion, threats or intimidation.

This shows, in their elementary characteristics, certain forms of unfair competition. But unfair competition like "police power" or fraud is not susceptible of any fixed boundary lines or definitions. As soon as one practice is condemned a new device will be formed to accomplish the same result and so on indefinitely. It will always be a question of fact to be determined in each particular case whether a practice or method in competition is unfair. In the Standard Oil Case<sup>11</sup> Mr. Chief Justice White, stating the averments in the bill, said:

" . . . unfair methods of competition, *such as* local price cutting at the points where necessary to suppress competition; espionage of the business of competitors, the operation of bogus independent companies, and payment of rebates on oil, with the like intent; the division of the United States into districts and the limiting of the operations of the various subsidiary corporations as to such districts so that competition in the sale of petroleum products between such corporations had been entirely eliminated and destroyed;"

These practices are again referred to as illustrative of existing facts constituting unfair competition in *Nash v. United States*.<sup>12</sup> In the last case Mr. Justice Holmes, referring to the Standard Oil and American Tobacco Company cases, said:<sup>13</sup>

"Those cases may be taken to have established that only such contracts and combinations are within the act as, by reason of intent *or the inherent nature of the contemplated acts*, prejudice the public interests by *unduly restricting competition or unduly obstructing the course of trade.*"

<sup>11</sup>Standard Oil Co. v. United States (1911) 221 U. S. 1, 43, 31 Sup. Ct. 502, 509.

<sup>12</sup>(1913) 229 U. S. 373, 33 Sup. Ct. 780.

<sup>13</sup>229 U. S. at p. 376, 33 Sup. Ct. at p. 781. Italics inserted by the present writer.

The Clayton Act extends its prohibitions to the elimination of competition through stock ownership by one corporation in a competing company and by interlocking directorates in various corporations.

These general observations, opinions and legislation lead to the following generalization: A method of competition is unfair which is reprehensible, judged by general moral standards or ethics of business, and which results in unduly restraining competition or unduly obstructing the course of trade.

2. What relation must the unlawful methods or the business in which they are prevalent, sustain to interstate or foreign commerce?

Putting to one side the power of Congress to prohibit designated articles from going into the channels of interstate commerce and thereby *indirectly* affecting the manufacturers or producers of such inhibited traffic, and dealing directly with the powers exercised by Congress in creating the Federal Trade Commission, it seems clear that Congress has not attempted to usurp the police power of the States or to exercise regulatory powers over the producing or manufacturing business within the States.

"Commerce has nothing to do with land while producing, but *only with the product after it has become the subject of trade.*"<sup>14</sup> "Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. *Commerce succeeds to manufacture, and is not a part of it.*"<sup>15</sup>

Referring to the Knight case, the Supreme Court said:<sup>16</sup>

"... the refining of sugar under those circumstances *bore no distinct relation to commerce* between the States or with foreign nations."

Many other cases might be cited which sustain the principle above stated. The businesses carried on within a State are sub-

<sup>14</sup>McCready v. Virginia (1876) 94 U. S. 391, 396. Italics inserted by the present writer.

<sup>15</sup>United States v. E. C. Knight Co. (1895) 156 U. S. 1, 12, 15 Sup. Ct. 249, 253. Italics inserted by the present writer.

<sup>16</sup>United States v. Freight Association (1897) 166 U. S. 290, 313, 17 Sup. Ct. 540, 548. Italics inserted by the present writer.

ject to its police power and its regulation, even where articles are produced for interstate and foreign trade.

Interstate and foreign commerce begins when the commodity starts on its journey or is delivered to a common carrier for carriage; it is then that the Federal power secures jurisdiction over the subject. But a State may not tax an agent or drummer while endeavoring to secure trade within its territory for foreign goods; nor may a State prohibit persons from bringing foreign goods within the State or tax them as such after they have gone into the State; nor may a State by legislation *prohibit products of the State* from going into interstate commerce. Such legislation by States is invalid although there be no action by Congress.<sup>16a</sup> This is upon the broad principle that the course of trade is not to be interfered with. If States may not produce these results by legislation, certainly persons or corporations may be prevented from acts which interfere with the free movement of such commerce. Such acts by persons or corporations may be declared unlawful and be restrained by any process of law provided by Congress. The purpose of a person may not be to prevent interstate or foreign commerce, but if the act *does in fact, or may* in its natural and ordinary course, prevent such commerce, such act may be declared unlawful.

Unfair competition has for its ultimate object the lessening of the trade or the destruction of a competitor in business. If the competitor's business is producing commodities which do in fact go into the channels of interstate commerce the unfair competition has precisely the same effect upon interstate commerce as the action of a State would have which prohibited such products from going out of the State. It will not do to say that the person or corporation practicing the unfair methods will supply interstate and foreign commerce with traffic equal in amount to that which it destroys or prevents its competitor from producing. One of the very prime purposes of monopoly is to regulate the quantity produced in order to maintain or increase the price to the consumer. Free competition increases the quantity and reduces the price to the consumer. It follows, therefore, that to destroy production by unfair competition creates a monopoly and does in fact reduce the quantity of products going into the channels of interstate commerce.

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<sup>16a</sup>Kidd v. Pearson (1888) 128 U. S. 1, 9 Sup. Ct. 6; West v. Kansas Natural Gas Co. (1911) 221 U. S. 229, 31 Sup. Ct. 564.

The knowledge that these practices directly affect the movement of trade in interstate and foreign commerce is one of the results "of experience" referred to by President Wilson in his message to Congress asking for this legislation. The high cost of living is, in some degree, created by monopolistic conditions preventing competition and thereby decreasing the quantity of the products offered in the open markets. It was to reach this fundamental evil that the Act creating the Trade Commission was passed. It was to free the springs of commerce from pollution and obstructions which reduce the quantity of products in interstate and foreign commerce. Nor are the practices confined wholly within the State of production. Unfair methods of competition exist in the territories of consumption and often close the doors of commerce to competitors at consuming points. Control and methods of advertising; practices of agents in soliciting trade; dividing territory; monopoly of raw materials; all these come within the broad term "intercourse", and may be controlled by the Federal law when they affect interstate or foreign commerce.

From the foregoing we may draw this generalization: the Federal Trade Commission has jurisdiction, under section 5 of the trade act, to investigate and prevent any unfair competition which results, or may result, in lessening the commodities which pass into interstate and foreign commerce, or, to use the language of the Supreme Court, which result in "unduly obstructing the course of trade."

This is a broad field, and the work of the Federal Trade Commission will find a wide range for beneficent public service under the Act.

3. The procedure and the exercise of what are commonly termed "inquisitorial powers" by commissions are important to the public as well as to the private business interests.

Section 5 provides that:

"Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing notice of a hearing on a day and at a place therein fixed at least 30 days after the service of said complaint."

This procedure differs materially from that provided in the Act to regulate commerce. Here the complaint is to be made by the Commission. The Commission acts as a sort of grand jury. No private person or corporation may institute a proceeding by filing a complaint with this Commission as may be done under the Act to regulate commerce. The determination whether a formal investigation shall be instituted rests wholly with the Commission. After the Commission has made a complaint, it is provided that:<sup>17</sup>

"Any person, partnership, or corporation, may make application and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person."

A public investigation into the affairs of a private business may not be undertaken at the instance of a rival. If there is one principle dominant in our governmental polity it is that private rights and interests are to be free from "search and seizure" and that a person shall not be compelled to furnish evidence which may convict him of a violation of the law. It is, however, a necessary incident to the administration of all regulatory laws that investigations be instituted and conducted in such manner as to protect the public interests. The public interest demands a disclosure of the methods of competition employed by business men controlling large affairs. While the result of such investigation may be to prohibit, by an order, the continuance of a practice found to be unfair, it does not fall within the general prohibition against compelling evidence that may result in establishing criminality. In endeavoring to ascertain the methods of competing and their effects it is important that the investigation be both intelligent and searching. Effects which may be obscure to the ordinary observer may be uncovered and their true intent and purpose disclosed by practical business men familiar with the course of business affairs, especially those whose business is affected. To secure this it is quite essential that men engaged in the same line of business, who understand the course of trade and the effect of certain methods of competition, should be permitted to come into the investigation and assist in probing and developing the facts under investigation. This statute, therefore, seems to meet the requirements. It protects the private interest by not allowing private parties to institute proceedings. But after the Commission has determined upon a formal investigation it enables those who may be directly

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<sup>17</sup>Federal Trade Commission Act, Sec. 5. 38 Stat. 719.

interested and are vitally affected to intervene and aid in bringing out the facts.

4. The power of the Commission to make investigations may be exercised in two ways. First, in making general investigations and securing facts without the aid of judicial processes; and second, investigations wherein it becomes necessary to compel a witness to testify or furnish documentary evidence. In the former, the Commission may go to any extent it may deem proper in securing information regarding trade methods. So long as it can secure facts through the voluntary action of persons and corporations there is nothing to prevent investigation. This opens a wide field of public service which will be of great advantage, if wisely pursued, in enlightening the public and Congress regarding commercial and industrial affairs. It will be a great aid in determining what further legislation may be required. If the investigations instituted extend to the subjects and the extent and nature of foreign competition with the products of the United States, it will greatly aid Congress in tariff legislation.

A different question arises when the Commission undertakes to compel a person or corporation to give testimony or submit documentary evidence. Here civil rights and constitutional protection are involved. A word of warning and the general principle of construction were forcibly stated by Mr. Justice Bradley in *Boyd v. United States*.<sup>18</sup> Speaking in reference to furnishing an invoice of imported glass in a proceeding to recover penalties for violating the revenue laws, he said:

"Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form, but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed."

In a proceeding instituted by the Interstate Commerce Commission to compel a witness to testify and produce books and papers, Mr. Justice Harlan said:<sup>19</sup>

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<sup>18</sup>(1886) 116 U. S. 616, 635, 6 Sup. Ct. 524, 535.

<sup>19</sup>*Int. Com. Comm. v. Brimson* (1894) 154 U. S. 447, 476, 477, 14 Sup. Ct. 1125, 1133. Italics added by the present writer.

"As every citizen is bound to obey the law and to yield obedience to the constituted authorities acting within the law, this power conferred upon the Commission imposes upon any one, summoned by that body to appear and to testify, the duty of appearing and testifying, and upon any one required to produce such books, papers, tariffs, contracts, agreements, and documents, the duty of producing them, *if the testimony sought, and the books, papers, etc., called for, relate to the matter under investigation, if such matter is one which the Commission is legally entitled to investigate*, and if the witness is not excused, on some personal ground, from doing what the Commission requires at his hands."

But he adds that these rights and privileges are judicial questions requiring judicial proceedings to enforce and must be so presented that the judicial power is capable of acting on them.

In another case where the testimony of a witness and documents were sought, Mr. Justice Holmes said:<sup>20</sup>

"We are of opinion . . . that the purposes of the act for which the commission *may exact evidence embrace only complaints for violation of the act, and investigations by the commission upon matters that might have been made the object of complaint.* . . . in other words the power to require testimony is limited, as it usually is in English-speaking countries at least, to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law."

In *United States v. Louisville & Nashville R. R.*<sup>21</sup> the Supreme Court, following a strict construction, held that the power of the Commission to inspect all "accounts, records and memoranda" kept by carriers did not extend to "all correspondence."

"If it intended to permit the Commission or its examiners to seize and examine all correspondence of every nature, Congress would have used language adequate to that purpose."

In the Trades Act the word "correspondence" is included.

"Documentary evidence" means all documents, papers, and correspondence in existence at and after the passage of this Act.<sup>22</sup>

From these decisions, made in reference to the powers of the Interstate Commerce Commission, we may conclude that the power of the Federal Trade Commission to compel a witness to testify

<sup>20</sup>*Harriman v. Int. Com. Comm.* (1908) 211 U. S. 407, 419, 29 Sup. Ct. 115, 118. Italics added by the present writer.

<sup>21</sup>(1915) 236 U. S. 318, 335-336, 35 Sup. Ct. 363, 369.

<sup>22</sup>Sec. 4, paragraph 3. 38 Stat. 719.

or to furnish documentary evidence against his will, will be limited by the court to investigations into matters which may be the subjects of complaints and orders by the Commission.

5. Regulatory laws and their administration by commissions are the results of the vast development and expansion of industrial and commercial activities, the wide distribution of capital investments, and the interdependence of business interests. The interrelations of corporate interests, affecting many groups of investors who are unable to protect their investments from assault and depreciation, make it imperative, in the interest of industrial peace, that reasonable regulatory laws should prevail. Many businesses, otherwise purely private, have thus become, to some extent, charged with a public interest and subject to some regulation. On the other hand the private nature of industrial and commercial business must be recognized and respected or we shall lose that initiative and adventure so essential to personal and public advancement.

This dual character of large business and a desire to secure fair treatment for both private and public interests, led to the departure in administrative form. Government by commissions is the result of the necessity for the regulation of very complex conditions in the fields of human endeavor. The conviction that this regulation must be exercised with great care, and intelligent discrimination, has led to the creation of the commission as a governmental agency of administration.

In creating a commission Congress confers upon a group administrative power, each member of the group to be possessed of some expert knowledge necessary in the administration of the particular law. The members are to be chosen upon non-political considerations, and they are to act as a body, that is, by majorities. This secures a broader, more practical and more intelligent consideration of the mixed questions arising in the administration of such laws than can be secured through the service of a single officer, or by several officers—administrative and judicial—acting singly. In a commission there is less danger of arbitrary power because the members act as checks upon each other. It includes in one body the virtues of the jury system and the wisdom of intelligent judges. It is more democratic. It gets away from the one-man power so much feared by republics.

One objection advanced to this system of administration is that it is bureaucratic in nature. Those who put forward this objec-

tion fail to discriminate between these two distinct forms of administration. A bureau has a head with many inferior officers and clerks; it is the power and discretion of one man exercised through agencies wholly under his control. This is not true of a commission. The chairman of a commission is nothing more than a presiding officer with the additional duties of attending to routine administration; he has no power not possessed by his associates; he may be overruled in any proposal or action; he cannot control the clerical force in matters of substantive procedure. It is the whole body that determines substantive matters in administration. The elements of danger arising from bureaucracy are not, in fact, present in a commission of this class. There is no official domination by one man over the group. Every subject and the interests of every person affected have the consideration and the final judgment of a majority of the men constituting the commission. True, a commission exercises great powers over vast public and private interests. The dangers attendant upon the system are, the appointment to membership upon the commission of incompetent men, political dominancy, and, occasionally, the exercise of arbitrary power. The first two dangers must be guarded by the appointing power in the selection of men who possess special expert knowledge of some branch of the business regulated, and by disregarding their political affiliations except to see that, as a body, the commission is not dominated by any political party. The commission in all its activities must be free of political influences and actions if it is to receive and hold the confidence of the people. The risk of the temporary exercise of arbitrary power is incidental to human government and can only be corrected by a judicial review which does not destroy the desirable features and effective work of the commission.

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